IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2091 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DANGALBHAI ZIPABHAI JADAV

Versus

COMMISSIONER OF POLICE SURAT

Appearance:

MS DR KACHHAVAH for the Petitioner.

MR KAMLESH KACHHAVAH for Petitioner No. 1

RULE SERVED for Respondent No. 1-2

Ms.Archana Raval, Assistant GOVERNMENT PLEADER, for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 27/07/2004

ORAL JUDGEMENT

By filing this petition, the petitioner-detenu has challenged his detention order dated 29.1.2004. By

the impugned order, the petitioner is detained as a 'bootlegger' under the provisions of the Prevention of Anti-social Activities Act, 1985 ("PASA", for short). Along with the grounds of detention, the detenu was also served with the grounds of detention.

In the grounds of detention, there is a reference about three pending criminal cases against the petitioner. All these cases are under the Bombay Prohibition Act. It is alleged that the petitioner is dealing in foreign liquor. After considering the said cases and after considering the statements of witnesses, whose names have not been disclosed to the petitioner, the detaining authority has passed the order, detaining the petitioner under PASA as a 'bootlegger'. It is the aforesaid order, which is under challenge in this petition at the instance of the petitioner.

The said order is attacked by the petitioner on the ground that the criminal cases against the petitioner are under the Bombay Prohibition Act and it is alleged that he is dealing in foreign liquor. According to the learned Advocate for the petitioner, it cannot be said that the petitioner has violated public order, as, at the most, it can be said that, by committing such offences, he has violated law and order. He submitted that by not disclosing the names of the witnesses, the authority has committed illegality, as, the Authority, without any basis, withheld the names of the witnesses and by not giving the names of those witnesses, the petitioner is denied his right to make effective representation.

To substantiate this point, the learned Advocate for the petitioner has relied on the decision of this Court in Kishor Naginbhai Parmar v. State of Gujarat & Ors., 2000 (4) GLR 3236, wherein this Court (Coram : A.L. Dave, J.) held as under :-

> " ... ...
>
> 14. In this view of the matter, the order of the detaining authority and the grounds of detention do not indicate the basis of arriving at the subjective satisfaction. A mere statement about having verified the veracity, genuineness and correctness of the fear expressed by the witnesses, under such circumstances, can be of no virtue, in absence of contemporaneous material. The detention therefore stands vitiated for want of

proper exercise of powers under Sec.9(2) of the PASA Act and resultant infringement of a constitutional right of the detenu of making an effective representation due to non-disclosure of names of the witnesses. The order of detention, therefore, deserves to be quashed and set aside by allowing this petition.

... ...'

In the instant case also, no credible material is available on record, by which it can be said that the antecedents of the petitioner have been tried to be verified. On considering the said judgment of this Court, it can be said that the subjective satisfaction of the authority, reached on exercise of the powers under Section 9(2) of PASA, has been vitiated.

The learned Advocate for the petitioner has also submitted that in a large number of cases, the Supreme Court has considered that involvement in bootlegging activities does not amount to threat to public order or public health. To substantiate this contention, the learned Advocate for the petitioner has placed reliance upon the decision of this Court in L.P.A. No.223 of 2000, wherein, in paragraph 5, it is held as under by the Division Bench :

"5. If we examine the present case on the anvil of the test which has been applied by the Supreme Court in the case of K.S.Zala v. State of Gujarat (Supra), i.e. with regard to the presence of credible material and as to how the detaining authority has made the mention against the appellant being an obstruction to the public health and public order, we find that in the instant case so far as the statements of the witnesses which were recorded with regard to unregistered cases, that ground has been rejected by the learned Single Judge himself. It is, of course, true that after narrating the particulars of the criminal cases, the detaining authority has mentioned that the activities of the appellant were an obstacle to the public health and public order, but this bald observation cannot be taken to be

decisive so as to arrive at the satisfaction that the activities of the petitioner were prejudicial to the public order or public health and that tempo of public life was disturbed. No observation made in any part of the judgement can be read in isolation and bereft the context. The judgement is to be read as a whole and even the observations which have been made by the Supreme Court in para 6 of the judgement are to be considered in light of the earlier observations made in para 5 where presence of credible material before the detaining authority has been insisted upon. Thus, litmus test to find out as to whether it is a case of breach of public order or breach of public health is concerned, credible material has to be there. In the case of K.S.Zala before the Supreme Court, the detaining authority had also relied upon the statements of the witnesses so as to show that violence resorted to by the petitioner in that case had disturbed the even tempo of public life and the material on record had shown that members of the public of those localities had to run away from there and to go inside their houses and to close their doors. No such fact situation has been mentioned in the present case and the ground with regard to the statements of the three witnesses has been rejected by the learned Single Judge himself and it has been held that there had been violation or infringement of the petitioner's right against such statements. In this view of the matter whatsoever said by the three witnesses with regard to unregistered cases and with regard to the three incidents referred to hereinabove, it cannot be considered to be the material germane for the purpose of consideration of the threat to the public health and public order. Thus, the only material which remains is the registered criminal cases and that by itself cannot be said to be a material for the purpose of holding that the appellant's activities had become a threat to the public order

and public health. Necessary material in this regard is totally wanting in the body of the detention order itself. In large number of cases, the Supreme Court has considered that involvement in bootlegging activities even if coupled with violence does not amount to threat to public order or public health. The mere mention of allegations unless they are supported by any material cannot be said to be material germane for the purpose of arriving at the satisfaction with regard to breach of public order or public health and we find that after giving particulars of criminal cases, the detaining authority by including certain allegations, not supported by any credible material has simply observed that the appellant's activities were an obstacle to the public health and public order. In this view of the matter keeping in view the observations made by the Supreme Court in the case of K.S.Zala v. State of Gujarat (supra) itself in paras 4 and 5, we do not find that it can be held to be a case of breach of public health and public order. Learned counsel for the appellant has also argued several other points before us, but we do not find it necessary to go into those grounds. It may be mentioned that it was not a case of breach of public order or public health and it was not argued before the learned Single Judge. Even if that be so, in such matters, the point which arises on the face of the facts of the case by the body of the order itself, which does not require further investigation of the facts, can certainly be allowed to be raised and we allow learned counsel for the appellant to raise this point and find that this point is not without substance. The impugned order passed by the learned single Judge upholding the detention order therefore, cannot be said to be in consonance with the settled position of law. The detention order deserves to be quashed and set aside on this ground alone. We, therefore, do not go into other grounds which were raised on behalf of the

appellants.

... ..."

If the statements of the secret witnesses are taken away, then, the only material which remains is the registered criminal cases and that by itself cannot be said to be a material for the purpose of holding that the petitioner's activities had become a threat to the public order and public health. Necessary material in this regard is totally wanting in the body of the detention order itself.

As per the decision of the Division Bench, only on the basis of registered cases, it cannot be said that it is a case of violation of public order, and, at the most, it can be said to be a case wherein there is violation of law and order.

A mere statement about having verified the veracity, genuineness and correctness of the incidents narrated in the statements of witnesses and having been satisfied about the fear expressed by the witnesses, can be of no consequence, in absence of contemporaneous material. The detention therefore stands vitiated for want of proper exercise of powers under Section 9(2) of the PASA and resultant infringement of a constitutional right of the detenu of making an effective representation due to non-disclosure of names of the witnesses.

Considering the aforesaid decisions, the petition is required to be allowed and it is accordingly allowed. The order of detention is quashed and set aside. It is ordered that the detenu be released forthwith unless he is required in connection with any other case. The Rule is made absolute accordingly.

27th July, 2004 (P.B. Majmudar, J.)

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(apj)